No. 83-1059

IN THE

Supreme Court of the United States

October Term, 1983

JOHN T. LANGEN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Question Presented

Should evidence found in a search by the police that is plainly correct under *United States* v. *Ross*, 456 U.S. 798 (1982), be suppressed because the search took place before *United States* v. *Ross* was decided?

The New York Court of Appeals answered this question in the negative.

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Preliminary Statement

Petitioner seeks a Writ of Certiorari to review an October 27, 1983 order of the New York State Court of Appeals. By that order, the Court of Appeals reversed a November 4, 1982 order of the Appellate Division, First Department, and denied petitioner's motion to suppress physical evidence. The Court of Appeals remitted the case to the New York Supreme Court for further proceedings on the indictment.

Statement of the Case

This case originated in the late afternoon of September 14, 1980, when two police officers in a patrol car observed petitioner sniffing cocaine as he drove his pick-up truck on the upper level of the Queensboro Bridge. The officers stopped petitioner and, after petitioner stepped out of his truck to talk to the officers, saw in petitioner's vest pocket a plastic vial containing cocaine. Petitioner was arrested and was read the *Miranda* warnings. Moments later, without being asked a single question, petitioner suddenly volunteered to the officers that he had never before seen the locked suitcase located behind his seat in the pick-up truck. Upon hearing this, one of the officers removed the suitcase from the truck, opened it with a screwdriver and found cocaine, cash and Langen's bank book inside.

In Indictment No. SN4802/80, petitioner was charged with one count of Criminal Possession of a Controlled Substance in the Third Degree based upon his possession of the drugs found inside the suitcase (Penal Law §220.16). Petitioner moved to suppress those drugs. At the suppression hearing, the prosecutor argued, *inter alia*, that the search of Langen's suitcase was permissible. On May 28, 1981, after the hearing, Justice Milton Williams granted the motion to suppress. The court found that the initial stop was valid and that the arrest for the drugs in the vial which came into plain view was legal. However, the court, citing *People* v. *Belton*, 50 N.Y.2d 447 (1980), *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), found that the locked suitcase should not have been searched without a warrant.

On appeal to the Appellate Division, First Department, the People cited *People* v. *Belton*, 55 N.Y.2d 49 (1982), and *United States* v. *Ross*, 456 U.S. 798 (1982) and again argued that the search of Langen's locked suitcase was permissible. In response, petitioner argued that those cases, decided after the motion to suppress was granted in this case, should not be applied "retroactively" to the pending appeal. On November 4, 1982, the Appellate Division affirmed, without opinion, the order suppressing the cocaine.

Permission to appeal to the New York State Court of Appeals was granted on December 13, 1982. On appeal to that court the People once again cited *People* v. *Belton*, 55 N.Y.2d 49 (1982) and *United States* v. *Ross*, 456 U.S. 798 (1982) and again argued that the search of the locked suitcase was permissible. Petitioner again argued that these cases should not be applied "retroactively" to the pending appeal.

On October 27, 1983, the Court of Appeals reversed the order of the Appellate Division and denied petitioner's motion to suppress the physical evidence found in the suitcase. The majority of that court followed the analysis in *United States* v. *Johnson*, 457 U.S. 537 (1982), and found that *United States* v. *Ross*, 456 U.S. 798, should be given retroactive application to the instant appeal. The concurring judges found the analysis unnecessary. Inasmuch as petitioner had disavowed ownership of the suitcase and its contents, the concurring judges found that petitioner had no expectation of privacy in the suitcase. Thus, they concluded, the opening of the suitcase did not involve petitioner's Fourth Amendment rights.

Reasons for Denying the Writ

1. The State court decision in the instant case is not final.

Petitioner seeks to invoke this Court's jurisdiction under title 28 U.S.C. §1257(3). That section requires that the judgment appealed from be final. The final judgment in a criminal proceeding is the sentence. *Berman* v. *United States*, 302 U.S. 211 (1937); *Parr* v. *United States*, 351 U.S. 513, 518 (1956). Thus, a state court judgment which merely disposes of a motion relating to the admissibility of evidence lacks the finality necessary to support review by this Court. *See Chapman* v. *California*, 405 U.S. 1020 (1972).

Here, petitioner seeks to appeal from an order of the New York State Court of Appeals which denied petitioner's pre-trial motion to suppress physical evidence and remitted the matter to the New York Supreme Court for further proceedings, i.e., a trial on the indictment. Since petitioner has not yet been tried, much less sentenced, the order from which he seeks to appeal is clearly non-final. Thus, the Writ should be denied.

2. The instant case presents no constitutional question deserving of this Court's review.

In *United States* v. *Ross*, 456 U.S. 798 (1982), this Court held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. 456 U.S. at 825. Petitioner argues that the New York Court of Appeals erred in upholding the search in this

case, conducted prior to the date that *United States* v. *Ross* was decided. To support his argument, petitioner cites *United States* v. *Johnson*, 457 U.S. 537 (1982). In *Johnson*, this Court held that Fourth Amendment decisions enunciating a rule of law which invalidates police conduct should be given retroactive application to cases not yet final when that decision was rendered, *except* in cases where the police relied upon the prior, settled law. Petitioner argues that he fits within the exception carved out in *Johnson*. Therefore, he contends that *Ross* should not have been applied retroactively in this case by the New York Court of Appeals. Petitioner's contention is not worthy of review.

First, despite the fact that the Court of Appeals thought otherwise, *United States* v. *Johnson* is not relevant to the determination of the retroactivity of *Ross*. As just noted, in *Johnson*, this Court decided that a rule of law which invalidates police conduct should be applied retroactively except in cases where the police had relied upon prior, settled law. The Court in *Johnson* did not consider whether retroactive application should be given to a rule of law which upholds and validates police conduct. Thus, despite the fact that the holding in *Johnson* is broadly written, seemingly to encompass all Fourth Amendment decisions, *Johnson* has no relevance to a decision such as *Ross* which validates police conduct.

Even assuming *United States* v. *Johnson* were relevant to the determination of the retroactivity of *Ross*, petitioner would not fit within the exception to retroactivity noted in *Johnson*. An analysis of petitioner's argument makes plain that the exception in *Johnson* was intended to benefit the police and not the criminal. Petitioner contends that he fits

within the *Johnson* exception because he relied upon prior settled law. But, the exception to retroactivity in *Johnson,* which has the effect of maintaining the "status quo," is designed to uphold the conduct of police officers who relied upon prior settled law in the course of their official business. The exception reflects judicial recognition that there is no deterrence benefit in invalidating the actions of the police who were relying upon law which, at the time, was clear.

Here petitioner is attempting to fit within the exception by likening himself to a police officer. However, as this Court in *Ross* quite pointedly asserted, "any interest in maintaining the status quo that might be asserted by persons who may have structured their business of distributing narcotics or other illicit substances on the basis of judicial precedents clearly would not be legitimate." (*United States* v. *Ross,* 456 U.S. at 824 n.33).

Moreover, even if petitioner had the right to rely on settled law to conduct his narcotics business, the state court decision here would not be inconsistent with *Johnson* because the law petitioner cites was not settled. *See Robbins* v. *California,* 453 U.S. 420 (1981). Thus, even if *United States* v. *Johnson* were to be applied here, the *Ross* decision would be entitled to retroactive application since petitioner would not fall within the sole exception to retroactivity it describes.

The conclusion that *Ross* should be given retroactive effect has been reached by every Circuit Court which has considered the question. In *United States* v. *Burns,* 684 F.2d 1066 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 823 (1983),

the Second Circuit applied *Ross* retroactively for the reasons described above. That court concluded that

> refusal to uphold searches later found constitutional would not serve the purposes underlying the exclusionary rule. . . . Because the Supreme Court has declared searches such as those involved here to be constitutional, no police misconduct has in fact occurred. Hence, there is no misbehavior to be deterred, and the interest in maintaining judicial integrity is not implicated, especially in light of the previously unsettled state of the case law in this area. *United States* v. *Burns*, 684 F.2d at 1074.

Courts of Appeals of other circuits have applied the Second Circuit's reasoning to give retroactive application to *United States* v. *Ross*. *See, e.g., United States* v. *Johns*, 707 F.2d 1093, 1097 (9th Cir. 1983); *United States* v. *Martin*, 690 F.2d 416, 421 (4th Cir. 1982). Clearly, the New York State Court of Appeals decision to apply *United States* v. *Ross* to uphold the search in the instant case was correct and in accord with federal law. There is no constitutional or federal question of substance to be decided here.

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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